

The rights of Indigenous peoples in national and international law Amnesty International

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“Canada must now work out fair and lasting terms of coexistence with Aboriginal people.... Canada's claim to be a fair and enlightened society depends on it.” -- Recommendation of the Royal Commission on Aboriginal Peoples, 1996.

The Canadian government's Royal Commission on Aboriginal Peoples (RCAP) found in its 1996 final report that widespread illegal encroachment on and expropriation of Indigenous peoples' land and resources threatens the survival of Indigenous cultures throughout Canada and unfairly deprives Indigenous communities of opportunities for healthy and sustainable livelihoods. According to the RCAP, “the actual reserve or community land base of Aboriginal people has shrunk by almost two-thirds since Confederation [of Canada as a country in 1867], and on-reserve resources have largely vanished.” The Royal Commission, which included a Supreme Court justice and a Quebec Court of Appeal justice as Commissioners, issued the warning that:

Aboriginal nations need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.

Many Indigenous peoples in Canada, including the Lubicon Cree in Alberta, and the majority of Indigenous peoples in British Columbia, Quebec and the eastern provinces, have never signed treaties with the Crown nor ceded their inherent aboriginal land and resource rights. Nonetheless, they have seen their lands unilaterally declared Crown property, their natural resources appropriated or sold off, and resource exploitation policies imposed without their consent. Although inherent aboriginal rights are embedded in the Canadian Constitution and recognized by Canadian courts, the Royal Commission pointed out that the Canadian government works on the assumption that Indigenous peoples don't hold title to disputed land. To prove title, Indigenous peoples must meet what the RCAP called a “very exacting” burden of proof. Then, before they can enter into a treaty relationship with the Crown, the Canadian government requires all Indigenous peoples to accept the extinguishment of their inherent rights.

Indigenous communities that have sought to exercise what they understand to be their inherent rights in respect to lands and resources have been subjected to

aggressive and sometimes violent enforcement actions, as Amnesty International has previously commented on. For example, at Ipperwash Provincial Park in Ontario where an unarmed native protester was killed by police in 1995, and at the community of Burnt Church in New Brunswick where excessive force may have been used in 2000 in asserting federal jurisdiction over the lobster fishery.

Amnesty International believes that the rights of Indigenous peoples already recognized in international law, treaties with the Crown, the Canadian Constitution, and rulings of Canadian courts and other aspects of Canadian law are an essential part of the framework of protecting and promoting human rights in Canada. Therefore Amnesty International calls on all levels of government in Canada to uphold and promote all rights of Indigenous peoples, rather than continuing to seek ways to diminish, extinguish, undermine or circumvent these rights.

Amnesty International also calls on the Canadian government, like all governments, to uphold the commitments it has made in signing and ratifying core international human rights conventions, to live up to widely agreed upon human rights standards, and to comply without delay and in a broad and systematic fashion with the urgent recommendations of its own commissions and UN treaty monitoring bodies.

In 1998, the United Nations Committee on Economic, Social and Cultural Rights, which monitors states' compliance with the International Covenant on Economic, Social and Cultural Rights, called on the Canadian government, in light of its obligations under the Covenant, to "act urgently with respect to the recommendations of RCAP... to take concrete and urgent steps to restore and respect an Aboriginal land and resource base adequate to achieve a sustainable Aboriginal economy and culture."

This recommendation was then echoed by the UNHRC which, when reviewing Canada's compliance with the International Covenant on Civil and Political Rights (ICCPR) in 1999, urged "decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation." The UNHRC also recommended that Canada's policy of requiring extinguishment of inherent or aboriginal rights be abandoned because it violates Canada's human rights obligations under the ICCPR.

In 2002, the UN Committee on the Elimination of Racial Discrimination expressed its concern over the slow progress toward implementing the recommendations of the RCAP.

In addition to the above calls by the UN to address general concerns related to Indigenous peoples' access to land and resources, Canada also has an outstanding obligation to take action on the specific 1990 UNHRC decision under Article 27 of the Covenant regarding the rights of ethnic, religious and linguistic minorities to enjoy their own culture, that continued threats to the Lubicon's culture and way of life constitute a violation of their human rights.

Canada is also obligated to uphold the general recommendation to all states by the UN Committee on the Elimination of Racial Discrimination to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent." The requirement of informed consent is also found in other international human rights instruments which, although they are not yet legally binding on Canada, are nonetheless highly authoritative and indicate minimum standards which the federal government should meet. These instruments include the Convention on Indigenous and Tribal People (ILO Convention 169), the Draft United Nations Declaration on the Rights of Indigenous Peoples, and the Organization of American States draft American Declaration on the Rights of Indigenous Peoples.

Acting on these human rights requirements necessarily involves both federal and provincial levels of government. The federal government has argued that it cannot uphold human rights treaties or the recommendations of UN treaty bodies in areas of provincial jurisdiction. But, in fact, the federal government has responsibility under the Canadian Constitution to protect the interests and lands of Indigenous peoples. The federal government also has an obligation to ensure that the international human rights conventions it ratifies are upheld in all jurisdictions in Canada. This obligation of the federal government has been repeatedly affirmed by UN human rights bodies which have stressed that inaction at the provincial level does not excuse Canada's failure to comply.